Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

M. DREW BROWN and BRENDA A. BROWN,
h/w, individually and as guardians and natural parents of
ASHLEY L. BROWN, and DREW C. BROWN,
Petitioners,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals improvidently affirmed summary judgment in favor of Defendant, given that the Pennsylvania Supreme Court has granted allocatur in the case principally relied upon by both Courts in order to reach their respective determinations in favor of Defendant.

2. Whether the Court of Appeals improvidently affirmed summary judgment in favor of Defendant(s), given the instant decision conflicts with other Court of Appeals decisions involving the same questions.

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OPINIONS BELOW

The United States District Court, Eastern District of Pennsylvania, granted summary judgment in favor of Respondent in an unpublished order. App. at 3a. The Third Circuit Court of Appeals affirmed the District Court in an unpublished decision rendered on March 7, 1997. App. at 1a.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C.§ 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section 1.

STATEMENT OF THE CASE

This case arose in November of 1993, when Petitioner, Brenda A. Brown, applied a chemical waterproofing sealant to the brick exterior of the family home in Lansdowne, Pennsylvania. Immediately thereafter, Petitioners experienced the onset of intense physical discomfort as a result of fumes emanating from the sealant. This made it necessary for them to vacate their home, and caused damage to the residence, as well as to household items contained therein. Petitioners incurred expenses for alternate housing due to the inhabitability of their residence, and asserted a claim for damages and expenses pursuant to the provisions of the homeowners' insurance policy issued to them by Respondent.

Respondent cited to the "Pollution Exclusion Clause" contained in the policy language and elected to deny the claim in total based upon that provision.

FACTUAL BACKGROUND

After unsuccessful attempts at resolution, Petitioners filed suit against Respondent in the United States District Court for the Eastern District of Pennsylvania. Following a comprehensive discovery process, there were cross-motions for Summary Judgment filed. On or about June 28, 1996, the District Court, in an Opinion by The Honorable Daniel H. Huyett, III, denied Petitioner's Motion, and granted Summary Judgment in favor of Respondent, relying principally on the holding in *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 678 A.2d 802 (Pa. Super. 1996) allocatur granted April 11, 1997, *Madison Construction Company v. Harleysville Mutual Insurance Co.*, 1995 WL 562297, (Pa. Super., September 25, 1995), *Madison Construction Company v. Harleysville Mutual Insurance Company*, No. 4329 Phila. 1994, 1996 WL 338810 (Pa. Super. June 20, 1996).

On or about September 18, 1996, Petitioners filed a timely Appeal of the District Court's Decision with the United States Court of Appeals for the Third Circuit. On or about March 7, 1997, the Court of Appeals affirmed the Decision of the lower Court for essentially the same reasons stated in the District Court's Memorandum and Order dated June 28, 1996, i.e., the holding in *Madison, supra.* The instant Petition follows.

SUMMARY OF THE ARGUMENT

Five (5) weeks after entry of the Decision of the Court of Appeals, the Pennsylvania Supreme Court granted allocatur to the Plaintiff in *Madison, supra.*, which, it is submitted, clearly evidences that the law of the State of Pennsylvania remains unsettled and in flux as to the critical issue presented in the matter at bar.

Further, there exists a plethora of decisions rendered by Pennsylvania Courts addressing the specific question of insurance policy language interpretation relative to pollution exclusions, and these opinions are by no means consistent. Cf. *O'Brien Energy Sys. Inc. v. American Employer's Ins. Co.*, 427 Pa. Super. 456, 629 A.2d 957 (1983), allocatur denied, 537 Pa. 633, 642 A.2d 487 (1994), *American Iron & Steel Institute v. Environmental Protection Agency*, (1977 CAS) 560 F.2d 589, 10 Envt Rep Cas 1549, 7 ELR 20624, 44 ALR Fed 813, cert. den. (1978), 435 U.S. 914, 55 L.Ed 2d 505, 98 S.Ct. 1467, 11 Envt Rep Cas 1320, *Greater Boston Television Corp. v. Federal Communications Corp.*, (1971) 149 US App. DC 322, 465 F.2d 268, 31 ALR Fed 765, cert. den. 406 U.S. 950, 32 L.Ed 2d 338, 92 S.Ct. 2042, *Island Associates, Inc. v. Eric Group, Inc.*, 894 F.Supp. 200 (W.D. PA. 1995).

The same inconsistency exists in other jurisdictions and cases, as evidenced by the Opinions in *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992), *Conde v. State Farm Fire and Casualty Company*, 43 F.3d 1471, 1994 WL 7050 73 at II (6th Cir. 1994), *Prudential-LMI Commercial Ins. Co. v. Meadowwood Condominium Assoc.*, 1992 WL 189490 (E.D. Pa. 1992), *Grinnel Mut. Reinsurance Co. v. Wasmuth*, 432 N.W. 2d 495 (Minn App. 1988).

This gives rise to a reasonable conclusion that the subject policy language at issue is susceptible to more than one interpretation. *Cohen v. Erie Indemnity Company*, 288 Pa. Super. 445, 451, 432 A.2d 596, 599 (1981).

REASONS FOR GRANTING THE WRIT

I. PETITIONERS HAVE BEEN IMPROPERLY PRECLUDED FROM HAVING THEIR CLAIM ADJUDICATED ON THE MERITS, BY VIRTUE OF AN ERRONEOUS DECISION ENTERED BY THE LOWER COURT.

Summary Judgment is a proper mechanism for deciding and disposing of matters in which there are no material issues in question. The case *sub judice* demands studied inquiry and deliberate consideration of the matter in dispute, as it implicates genuine and legitimate questions of both law and fact.

II. THE DECISION BELOW WAS PREMISED UPON STATE CASE LAW THAT IMMEDIATELY POST-DECISION WAS ACCEPTED FOR REVIEW BY THE PENNSYLVANIA SUPREME COURT.

The Court of Appeals rendered it's Decision on March 7, 1997, and cited to the Memorandum and Order of the District Court as support for that finding. Of particular significance is that the initial Decision in *Madison* was in favor of Plaintiff. Upon reconsideration, a determination in favor of Defendant followed. The Court of Appeals relied exclusively on *Madison, supra.*, in granting summary judgment to Respondent. On April 11, 1997, the Pennsylvania Supreme Court granted allocatur to the Plaintiff in *Madison*, and the matter presently remains under review. The procedural history demonstrates the difficulty this issue has engendered for the judiciary.

III. THE LAW IS UNSETTLED AS TO INTERPRETATION OF INSURANCE POLICY POLLUTION EXCLUSION LANGUAGE, AND SHOULD BE RESOLVED BY THIS COURT.

The cases cited herein clearly demonstrate the inconsistent results in matters involving interpretation and application of insurance policy pollution exclusion language. This problem is pervasive, and a significant number of state and federal courts are struggling with this issue. In order to provide uniformity and a clear rule of law, this Court should resolve these inconsistencies.

CONCLUSION

There have been compelling reasons set forth to justify the granting of this Petition for Writ of Certiorari. Assuming *arguendo* that the Opinion of the Third Circuit Court of Appeals was in accord with applicable law, the foundation of that Decision was the holding in *Madison, supra.*, which is now under scrutiny by the Pennsylvania Supreme Court. As such, the holding of the Court of Appeals, was, at best, premature. An unfortunate circumstance of timing should not work to deny Petitioners their right to present their proofs and have a full and fair adjudication of the claim based on the merits.

The Petitioners herein respectfully request that this Honorable Court grant the Petition.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1618

M. DREW BROWN; BRENDA A. BROWN,
H/W, INDIVIDUALLY AND AS GUARDIANS AND
NATURAL PARENTS OF ASHLEY L. BROWN,
AND DREW C. BROWN

Appellants

v.

AMERICAN MOTORISTS INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 94-07505)
District Judge: Honorable Daniel H. Huyett, 3d

Submitted Under Third Circuit LAR 34.1(a)
February 28, 1997
Before: SCIRICA and ALITO, *Circuit Judges*,
and LAY, *Senior Circuit Judge*[*]

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[*] Honorable Donald P. Lay, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court entered on July 2, 1996 be and is hereby affirmed essentially for the reasons stated in the district court's memorandum and order dated June 28, 1996. Costs taxed against appellants.

BY THE COURT

/s/ (signature illegible)
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: MAR 7 1997

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 94-7505

M. DREW BROWN and BRENDA A. BROWN, h/w, INDIVIDUALLY AND AS GUARDIANS AND NATURAL PARENTS OF ASHLEY L. BROWN, AND DREW C. BROWN,

Plaintiffs

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant

MEMORANDUM & ORDER

HUYETT, J. **June 28, 1996**

Plaintiffs M. Drew and Brenda A. Brown and Defendant American Motorists Insurance Company have filed cross Motions for Summary Judgment. For the reasons discussed below, Plaintiffs' Motion will be **DENIED** and Defendant's will be **GRANTED**.

I. *BACKGROUND*

Although the parties disagree on many of the facts surrounding Plaintiffs' claims, the material facts are not in dispute. In November of 1993, Plaintiff Brenda Brown applied a chemical waterproofing sealant to the brick exterior of Plaintiffs' home in Lansdowne, Pennsylvania. Plaintiffs allege that fumes, (Am. Compl. ¶11g; Pls. Answer to Def.'s First Set of Interrogs. ¶2; M. Brown Dep. at 64-65; B. Brown

Dep. at 33-35), from the sealant caused them intense physical discomfort, which made it necessary for them to vacate their home. They claim damage to the house and to their personal belongings, and that they incurred additional living expenses because of the inhabitability of their home. In December of 1993, Plaintiffs filed a property loss claim under their homeowners insurance policy with Defendant. Defendant denied the claim on the grounds that it fell within the policy's pollution exclusions.[1] Plaintiffs then brought this suit, claiming in five counts that Defendant breached the insurance contract and used bad faith in denying coverage.

II. *DISCUSSION*

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A. BREACH OF INSURANCE CONTRACT

Interpretation of an insurance policy is a matter for the Court, rather than for the jury. *Allstate Ins. Co. v. Brown*, 834 F. Supp. 854, 856 (E.D. Pa. 1993). Whether a particular loss is within a policy's coverage is a question of law that may be decided at the summary judgment stage. *Aetna Life & Casualty Co. v. Barthelemy*, 836 F. Supp. 231, 235 (M.D.

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[1] In relevant part, the exclusion provides that Defendant does not insure against loss caused by "[d]ischarge, dispersal, seepage, migration, release or escape of pollutants." (Policy at 7-8.) "Pollutant" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." (*Id.* at 8.)

Pa. 1993), *rev'd on other grounds*, claim falls outside the coverage provided by the policy issued by Defendant.

1. The Pollution Exclusion

Plaintiffs' claim for damage to their house falls squarely within the pollution exclusion clause, which was quoted above at footnote 1. The Court is required to give effect to clear and unambiguous language in an insurance policy, as that language most accurately manifests the intent of the parties. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, No. 4329 Phila. 1994, 1996 WL 338810, at *2 (Pa. Super. June 20, 1996). A term is unambiguous unless "reasonable people, considering it in the context of the entire policy, would honestly ascribe different meanings to it." *Allstate*, 834 F. Supp. at 857. The Court is not to torture policy language to create ambiguities. *St. Paul Fire & Marine Ins. Co. v. United States Fire Ins. Co.*, 655 F.2d 521, 524 (3d Cir. 1981).

Plaintiffs argue that the noxious fumes that made their home unlivable were not "pollutants" under the pollution exclusion because the fumes came from any over-the-shelf product, used in an everyday activity. Essentially, Plaintiffs' position is that a common sense understanding of the term pollutants, as reasonably understood by Plaintiffs, does not include the fumes here.

Whether or not fumes from a household product would commonly be understood as a pollutant is not the issue, however. The term pollutant is defined in the policy to include solid, liquid and gaseous irritants and contaminants, including fumes and vapors. This definition is clear and unambiguous, and includes the fumes that Plaintiffs claim caused them sufficient irritation to make them vacate their home. *See Madison Constr. Co.*, 1996 WL 338810, at *3 (finding fumes from commonly used sealant a pollutant under

similarly worded pollution exclusion). Where a term is clearly and unambiguously defined in a policy, the Court will not substitute a common definition of the term for the definition contained in the policy. *American State Inc. Co. v. Nethery*, 79 F.3d 473, 475-76 (5th Cir. 1996) (refusing to substitute common meaning of "pollutant" for policy definition).[2] The policy definition of pollutants includes the fumes at issue here, and that definition must be given effect.

Plaintiffs next argue that the policy phrase "discharge, dispersal, seepage, migration, release or escape" is ambiguous because it was not intended to apply to the everyday activities of a homeowner; rather, Plaintiffs argue that the phrase was intended to apply only to intentional acts of polluters who cause harm to the environment. This argument is without merit. The best manifestation of the intent of the parties is the clear and unambiguous language of the policy. *Madison Constr. Co.*, 1996 WL 338810, at *2. Plaintiffs have not identified any ambiguity in the language quoted above, and none is apparent to the Court. *See id.* at *3-4 (no ambiguity in similar situation). Accordingly, the Court declines to look to, or speculate on, the intent of the parties in an attmept to avoid the plain meaning of policy language. *Id.*

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[2] Plaintiffs place great reliance on *Island Assocs., Inc. v. Eric Group, Inc.*, 894 F. Supp. 200 (W.D. Pa. 1995) for their argument that the commonly understood definition for pollutant should be substituted for the policy definition. *Island Assocs.* is unpersuasive in that it conflicts with the Third Circuit's analysis of the proper use of an insured's reasonable expectations. *See Bensalem Twp. v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1311-12 (3d Cir. 1994) (explaining that reasonable expectations of insured only defeat unambiguous policy language where insurer has created reasonable expectation of broader coverage). Moreover, the Pennsylvania Superior Court recently reaffirmed the importance of the plain meaning of policy language in a case with facts similar to the instant case. *Madison Constr. Co.*, 1996 WL 338810, at *3-4.

It is undisputed and undisputable that the fumes seeped or migrated into the house. (*See* Am. Compl. ¶8; Brown Dep. At 35; D. Brown Dep. At 157-58; Pls. Answer to Def.'s First Set of Interrogs. ¶2.) Therefore, Plaintiffs' house damage claim falls within the plain language of the pollution exclusion, and outside the coverage provided by Defendant.[3]

2. Personal Property Coverage

Plaintiffs' homeowners policy insures against damage to personal property caused by certain enumerated perils. (Policy at 8.) The only enumerated peril invoked by Plaintiffs, and the only one even arguably implicated here, is smoke. "Smoke" is defined, somewhat circuitously, as "sudden and accidental damage from smoke." (Policy at 8.)

Smoke did not cause Plaintiffs' damages. First, "damage from smoke" does not encompass contamination from chemical fumes. *K & Lee Corp. v. Scottsdale Inc. Co.*, 769 F. Supp. 870, 873-74 (E.D. Pa. 1991), *aff'd*, 953 F.2d 1380 (3d Cir. 1992). Second, the damage here was not "sudden," *see Northern Ins. Co. v. Aardvark Assoc., Inc.*, 743 F. Supp. 379, 380 (W.D. Pa. 1990) (defining "sudden" as "abrupt and lasting only a short time"), *aff'd*, 942 F.2d 189 (3d Cir. 1991); on the contrary, it occurred gradually, over time, (B. Brown Dep. at 11; M. Brown Dep. at 157-58). Thus, any damage to Plaintiffs' personal property falls outside the coverage provided by Defendant.

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[3] There is a limited exception to the pollution exclusion clause that applies where the "discharge, dispersal, seepage, migration, release or escape [was] itself caused by [smoke]." (Policy at 8.) As discussed in the context of personal property, *infra.* smoke was not involved in Plaintiffs' claimed loss.

3. Living Expenses

Coverage for additional living expenses is predicated on a covered loss that makes an insured's residence "not fit to live in." (Policy at 4.) As discussed above, the loss to Plaintiffs' residence is not a covered loss. As a result, Plaintiffs' additional living expenses are not covered under the policy.[4]

B. BAD FAITH

To prevail on their bad faith claims, Plaintiffs would have to prove, *inter alia*, the absence of a reasonable basis for denying benefits. *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307-08 (3d Cir. 1995). As Plaintiffs' claims fall outside the policy coverage, Defendant's denial of coverage was necessarily reasonable, and Plaintiffs' cannot prevail on their bad faith claims.

III. *CONCLUSION*

There is no genuine issue of material fact in dispute, and Defendant is entitled to judgment as a matter of law on all of Plaintiffs' claims. Accordingly, summary judgment will be granted in favor of Defendant and against Plaintiffs. An appropriate Order follows.

/s/ Huyett
HUYETT, J.

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[4] Along with property damage and additional living expenses, Plaintiffs claim damages fro bodily injury and emotional distress. The policy issued by Defendant is a property policy that provides no coverage for these types of injuries.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 94-7505

M. DREW BROWN and BRENDA A. BROWN, h/w, INDIVIDUALLY AND AS GUARDIANS AND NATURAL PARENTS OF ASHLEY L. BROWN, AND DREW C. BROWN,

Plaintiffs

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant

ORDER

HUYETT, J. **June 28, 1996**

For the reasons stated in the foregoing Memorandum, Plaintiffs M. Drew and Brenda A. Brown's Motion for Partial Summary Judgment is **DENIED**, and Defendant American Motorists Insurance Company's Motion for Summary Judgment is **GRANTED**. Judgment is entered in favor of defendant and against Plaintiffs on all of Plaintiffs' claims.

IT IS SO ORDERED.

s/ Huyett
HUYETT, J.

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In The

Supreme Court of the United States

October Term, 1996

M. DREW BROWN and BRENDA A. BROWN, h/w, individually and as guardians and natural parents of ASHLEY L. BROWN, and DREW C. BROWN,

Petitioners,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT CONCERNING CORPORATE OWNERSHIP PURSUANT TO RULE 29.6

As required by Rule 29.6, American Motorists Insurance Company ("American Motorists") hereby makes the following disclosures. American Motorists is one of several companies known under the trade name Kemper. American Motorists is wholly owned by parent company Lumbermens Mutual Casualty Company. In addition, the following companies are nonwholly owned subsidiaries of American Motorists: (1) BBC Associates, Inc., of which American Motorists owns 50 percent; and (2) KAAL PGA Sales, Inc., of which American Motorists owns 50 percent.

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Defendant-Respondent American Motorists Insurance Company ("Respondent") hereby opposes the Petition for Certiorari by Plaintiff-Petitioners, the Browns ("Petitioners"). The Petition should be denied because the issues are purely issues of state law. It should also be denied because the Pennsylvania Supreme Court's acceptance of the *Madison* case for review[1] is not a cognizable basis for granting certiorari. The District Court and Court of Appeals followed principles of basic Pennsylvania contract law, and did not rely solely on the *Madison* decision.

FACTUAL AND PROCEDURAL BACKGROUND; STATEMENT OF THE CASE

As described in the District Court opinion (*see* 930 F. Supp. 207 (E.D. Pa. 1996); Appendix B to Petition for Writ of Certiorari [hereinafter "Petition"]), Petitioners' claim arises out of their application of a waterproofing product called HB-100 to a portion of the brick facing of their house. They allegedly began to smell fumes right away, and allege the contamination had become markedly worse when they returned from a Thanksgiving vacation. Eventually, they vacated the premises, although the house sustained no physical damage. In both their deposition testimony and their pleadings, Petitioners repeatedly characterized these events as "contamination," "emanation" and "migration" of "fumes" that were "irritant" or "toxic."

Respondent had issued a homeowners insurance policy to Petitioners, under which Petitioners submitted a claim for property damage and alternative living expenses. Respondent promptly inspected the house and investigated the claim,

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1. *See Madison Construction Co. v. Harleysville Mutual Ins. Co.*, 451 Pa. Super. 136, 678 A.2d 802 (1996), *app. granted in part*, __ Pa. __, 690 A.2d 711 (1997).

determined that there was no coverage, and formally denied coverage on the basis of the absolute pollution exclusion in the policy, while reserving its rights under all other terms and conditions of the policy.

The District Court granted Respondent's Motion for Summary Judgment, based on the policy's absolute pollution exclusion. It further held that Petitioners had not met their burden of showing insurer bad faith under current Pennsylvania law, because (in part) the denial of coverage had been correct in the first place. *See* Appendix B to Petition. The Third Circuit affirmed the District Court's granting of summary judgment "essentially for the reasons stated in the District Court's memorandum and order dated June 28, 1996." *Id.*, Appendix A.

The District Court primarily relied on familiar and well-established principles of contract interpretation, such as looking to the "clear and unambiguous language of the policy,"[2] not "tortur[ing] policy language to create ambiguities,"[3] and confining its inquiry to the four corners of the policy when that policy's plain meaning is unambiguous.[4] It is clear from the trial court's decision, and Petitioners do not argue otherwise, that the grounds for this decision were derived exclusively from state law. *See* Appendix B to Petition.

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2. Citing *Madison, supra*; *American States Ins. Co. v. Nethery*, 79 F.3d 473, 475-76 (5th Cir. 1996); *Allstate Ins. Co. v. Brown*, 834 F. Supp. 854, 857 (E.D. Pa. 1993).

3. Citing *St. Paul Fire & Marine Ins. Co. v. United States Fire Ins. Co.*, 655 F.2d 521, 524 (3d Cir. 1981).

4. Citing *Madison, supra*; *American States v. Nethery, supra*, 79 F.3d at 475-76.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE NOT PROPERLY INVOKED THE JURISDICTION OF THE SUPREME COURT FOR CERTIORARI REVIEW.

Petitioners invoke the jurisdiction of the Supreme Court based on 28 U.S.C. § 1257, and indicate that the constitutional basis for their claim is the federal Fourteenth Amendment, Section 1.[5] Petition, p. 1. Under Section 1257(a), certiorari review is not to be granted unless the issues in the case involve either (1) a federal treaty or statute, (2) a state statute's validity under the federal Constitution, or (3) a situation "where any . . . right, privilege, or immunity is specially set up or claimed under the Constitution or the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a). This case is based on the common law of contracts, and presents no federal questions, constitutional issues, or issues under any federal statutes. As is clear from the District Court's opinion, this controversy involves the interpretation of a clause in an insurance policy. Therefore it is

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5. Presumably Petitioners are referring to the Due Process Clause in the Fourteenth Amendment. Although the specific grounds are not articulated in the Petition, neither the Privileges and Immunities Clause of national citizenship, nor the Equal Protection Clause would seem to have even the remotest connection to this case. Under the standard "rational basis" test, to be applied where neither a fundamental right nor a protected class is implicated, Petitioners have no viable argument that the District Court's action was irrational or arbitrary and thereby violative of due process. *See, e.g., Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 580, 111 S. Ct. 2456 (1991) (concurring opinion stating that violations of due process that do not implicate a fundamental right are tested under "rational basis" analysis); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491, 75 S. Ct. 461 (1955).

not appropriate for certiorari review. *See, e.g., Adams v. Robertson*, __ U.S. __, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997) (certiorari not granted because federal constitutional issue was never presented to state Supreme Court); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S. Ct. 2849 (1977) (state court should be left free to decide issues of state law); *see also Edwards v. People of New York*, 76 S. Ct. 1058, 1062 (1956) (certiorari would not be granted on certain contentions that "involve only matters of state law and raise no federal questions"); *Kammerer v. Kroeger*, 299 U.S. 302, 303-04, 57 S. Ct. 196, 81 L. Ed. 253 (1936) (no basis for Supreme Court appellate review because no infringement of federal constitutional rights, and "question is one of state practice and remedy"); *cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988) (identifying issues that were considered sufficiently "federal" to justify Supreme Court review under former § 1257).

The fact that federal courts of appeal applying different states' substantive law have reached conflicting conclusions when presented with questions of application and interpretation of pollution exclusions in insurance policies does not transform the issue into one of federal law. States are generally permitted to have different common-law approaches to such areas as contract interpretation and insurance law.

The Supreme Court's involvement in resolving conflicts between federal circuits is traditionally limited to resolving conflicts on issues of *federal* law. *See, e.g., Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979), superseded on other grounds, as stated in *In re White Plains Development Corp.*, 137 B.R. 139, 141 (Bankr. S.D.N.Y. 1992). The cases cited by Petitioners to support their contention that a conflict among circuit courts supports the granting of certiorari

in fact demonstrates little more than a potential conflict between Ohio and Illinois law.[6]

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6. Petitioners cite four non-Pennsylvania decisions (Petition, p. 3). *Prudential-LMI Commercial Ins. Co. v. Meadowood Condominium Ass'n*, 1992 WL 189490 (E.D. Pa. 1992), is actually a Pennsylvania decision, although Petitioners include it as an opinion from another jurisdiction. *Grinnell Mut. Reinsurance Co. v. Wasmuth*, 432 N.W. 2d 495 (Minn. App. 1988), has been overruled by the Minnesota Supreme Court in *Board of Regents of University of Minnesota v. Royal Ins. Co. of America*, 517 N.W. 2d 888, 891 (Minn. 1994). This leaves *Conde v. State Farm Fire & Cas. Co.*, 43 F.3d 1471, 1994 WL 705073, **2 (6th Cir. 1994) (under Ohio law, a pollution exclusion for "contamination" unambiguously barred coverage, even though "contamination" was not defined in the policy), and *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043-44 (7th Cir. 1992) (under Illinois law, the terms "irritant" and "contaminant" in an insurance policy cannot be given limitless definition, although in this case the pollution exclusion did bar coverage). Therefore, as to the purported non-Pennsylvania cases that Petitioners cite, Petitioners have merely shown a potential conflict between Ohio and Illinois law.

Not only do Petitioners cite the overruled case (*Grinnell, supra*), but they also cite two cases that have absolutely *nothing* to do with the issues in this case or with the issues for which Petitioners cite them. *See American Iron and Steel Institute v. Environmental Protection Agency*, 560 F.2d 589 (3d Cir. 1977); *Greater Boston Television Corp. v. Federal Communications Comm'n*, 463 F.2d 268 (D.C. Cir. 1971); Petition, p. 3. In *American Iron and Steel*, the Third Circuit reviewed effluent standards promulgated by the EPA under the Federal Water Pollution Control Act and found that a federal appeals court has the discretionary authority to recall a mandate, although such a recall is disfavored, and even though the time for rehearing has expired. The *Greater Boston* case also entails recall of a government agency mandate, but one concerning the award of a construction permit to a television broadcaster, under 28 U.S.C. § 452. Neither case has anything to do with insurance, let alone a pollution exclusion.

II.

EVEN IF ACCEPTANCE OF *MADISON* FOR REVIEW *DID* JUSTIFY GRANTING CERTIORARI, THE DISTRICT COURT'S HOLDING DID NOT DEPEND ON *MADISON* ANYWAY.

A. The District Court's Opinion Is Soundly Reasoned and Followed Elemental Tenets of Pennsylvania Contract Law.

One of the grounds for which Petitioners seek a Writ of Certiorari is that the *Madison* case was accepted for review by the Pennsylvania Supreme Court on April 2, 1997, after the Third Circuit's affirmation of the decision below on March 7, 1997. Petition, p. 4. Many other Pennsylvania decisions support the proposition that a clear and unambiguous pollution exclusion may be given effect following standard contract law principles such as preserving the plain meaning of contract language, rather than distorting such meaning to fit imagined or desired ulterior purposes of the parties or the Court. *See, e.g., Reliance Ins. Co. v. Moessner*, __ F.3d __, 1997 WL 434866 (3d Cir. 1997) (summary judgment for insurer upheld because clear and unambiguous, absolute pollution exclusion precluded coverage for carbon monoxide migration); *O'Brien Energy v. American Employers' Ins. Co.*, 427 Pa. Super. 456, 629 A.2d 957 (1993) ("sudden and accidental" pollution exclusion precluded coverage for damages caused by migrating methane gas, so insurer entitled to summary judgment); *Lower Paxon Township v. United States Fidelity & Guaranty Co.*, 383 Pa. Super. 558, 557 A.2d 393, *app. denied*, 523 Pa. 649, 567 A.2d 653 (1989) ("An ever-increasing number of courts have rejected the insured's ambiguity argument and have found that 'sudden and accidental' has a clear, plain meaning that excludes coverage not only for intentional pollution but also for any unintentional release or disbursal of pollution that occurs gradually over time.");

Techalloy Co. v. Reliance Ins. Co., 338 Pa. Super. 1, 487 A.2d 820 (1984) ("sudden and accidental" pollution exclusion unambiguously precluded coverage, so insurer's demurrer granted); *Prudential-LMI, supra*, 1992 WL 189490 (E.D. Pa. 1992) (absolute pollution exclusion language is clear and unambiguous and applies to preclude coverage for damage caused by the "dispersal of the insecticide/pollutant").[7] The District Court followed the consensus of Pennsylvania courts that have addressed pollution exclusions.

The District Court's arrival at the same conclusion as the *Madison* courts is unremarkable. Where "toxic" "fumes" "migrated" from some sealant compound that Petitioners used on their house and allegedly rendered their house so contaminated that they had to leave, it is hardly a great leap of legal reasoning to call such fumes a "pollutant." The District Court's holding did not depend on the *Madison* court's application of a pollution exclusion. The District Court supported its holding on the factual similarity between the cases and, like the *Madison* court, on well-established principles of contract interpretation that a court should not torture or distort the meaning of otherwise plain policy terms such as "pollutant."[8]

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7. *See also Northern Ins. Co. of New York v. Aardvark Assocs., Inc.*, 942 F.2d 189 (3d Cir. 1991); *USF&G Co. v. Korman Corp.*, 693 F. Supp. 253 (E.D. Pa. 1988); *St. Leger v. American Fire & Cas. Ins. Co.*, 870 F. Supp. 641 (E.D. Pa. 1994) (lead paint is a "pollutant" within the meaning of the pollution exclusion in the insurance policy, and courts "must not torture the policy language in order to 'create ambiguities where none exist' "), quoting *McMillan v. State Mutual Life Assurance Co. of America*, 922 F.2d 1073, 1075 (3d Cir. 1990).

8. These are the very principles that the *Madison* decision itself relied on: A court should "ascertain the intent of the parties as manifested by the language of written instrument." *Madison, supra*, 678 A.2d at 805, quoting *Gene & Harvey Builders v. Pennsylvania Mftrs. Ass'n*, 512

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The significance of the state Supreme Court's acceptance of *Madison* for review is further diminished by the fact that the insurance policy under which Petitioners originally claimed is a property policy, not a liability policy as was the policy at issue in *Madison* (*supra*, 678 A.2d at 803).

B. Any Conflict That Exists in Pennsylvania Law on the Applicability of the Pollution Exclusion Does Not Indicate That That Exclusion Is Per Se Ambiguous.

Petitioners cite only two Pennsylvania cases that disagree with Respondent's position concerning pollution exclusions. *See Island Associates, Inc. v. Eric Group, Inc.*, 894 F. Supp. 200 (W.D. Pa. 1995); *Cohen v. Uri Indemnity Co.*, 288 Pa. Super. 445, 432 A.2d 596 (1981). It should be clear from the long list of Pennsylvania cases cited above that both *Island* and *Cohen* represent an endangered position. Recently, the Third Circuit indicated that Pennsylvania courts have "consistently interpretated pollution exclusion clauses to be clear and unambiguous." *Reliance v. Moessner*, *supra*, 1997 WL 434866, *5.[9]

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Pa. 420, 426, 517 A.2d 910 (1986). "When a provision of an insurance policy contains language which is clear and unambiguous, . . . a court is required to give effect to that language." *Id.*, citing *Standard Venetian Blind Co. v. American Empire Insurance*, 503 Pa. 300, 469 A.2d 563 (1983); *Gianni v. Russell & Co., Inc.*, 281 Pa. 320, 126 A. 791 (1924). "An insurer may draft a policy with explicit exclusions and the court will uphold the plain meaning of the exclusions since a policyholder cannot reasonably expect unlimited coverage in the face of an explicit, unambiguous limitation." *Id.*, quoting *Huffman v. Aetna Life & Cas. Co.*, 337 Pa. Super. 274, 282, 486 A.2d 1330 (1984).

9. While the *Island* case does disagree with Respondent's position concerning the lack of ambiguity of the pollution exclusion, it remains
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Petitioners rely on *Cohen*, *supra*, for the proposition that inconsistency between court decisions concerning pollution exclusions "gives rise to a reasonable conclusion that the subject policy language at issue is susceptible to more than one interpretation." Petition, p. 3, citing *Cohen*, *supra*, 432 A.2d at 599. First, Petitioners raise substantive issues from *Cohen* that the District Court below considered and rejected. Respondents should not have to reply to the substantive issues in opposing certiorari.

Second, the mere fact that there are conflicting state court decisions establishes neither the inherent ambiguity of contract language, nor the existence of different reasonable interpretations of such contract language. One Pennsylvania court noted that the insured

> cites *Cohen* [*supra*] for the proposition that where a provision in an insurance policy has been construed in different ways by the various courts that have considered it, this alone mandates that we find the provision ambiguous. We reject this contention, as have other courts that have considered it in the

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an isolated case and was also criticized by the District Court below as "unpersuasive in that it conflicts with the Third Circuit's analysis of the proper use of an insured's reasonable expectations." *Brown v. American Motorists*, *supra*, 930 F. Supp. at 209 n.2, citing *Bensalem Twp. v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1311-12 (3d Cir. 1994). Even the Pennsylvania law cases cited in *Island* itself all applied a pollution exclusion as clear and unambiguous in the insurers' favor. *See Island*, *supra*, 894 F. Supp. at 203, citing *Northern v. Aardvark*, *supra*; *St. Leger*, *supra*; *O'Brien*, *supra*; *Lower Paxon*, *supra*; *Techalloy*, *supra*. The court in *Island* had to rely on the Seventh Circuit decision in *Pipefitters*, *supra*, to find that a cleaning compound was not a "pollutant."

> context of the pollution exclusion itself. We do not regard *Cohen* as mandating that we find an ambiguity wherever judicial decisions considering a policy provision are in conflict, with no regard for our own analysis of the provision or wisdom of these decisions. Surely, we would be abdicating our judicial role were we to decide by the purely mechanical process of searching the nation's courts to ascertain if there are conflicting decisions. The law of Pennsylvania is that we must find an ambiguity only where the policy is reasonably susceptible of differing interpretations. Thus, whether other courts have reached varying conclusions regarding the meaning of a policy is only relevant where the various meanings ascribed are reasonable.

Lower Paxon, *supra*, 383 Pa. Super. at 573 (citations omitted) (finding "sudden and accidental" pollution exclusion unambiguous notwithstanding diversity of decisions in other courts). Respondent respectfully asks that the Supreme Court not disturb the sensible, straightforward approach of most Pennsylvania courts, which have not attempted to create a strained meaning for the clear and understandable term "pollutant."

CONCLUSION

Whatever conflict exists among the federal circuits or the various state jurisdictions, in this matter of exclusively *state* law, should be left for the state courts to sort out, as Pennsylvania courts are now doing. Clear principles of contract interpretation support the applicability of an unambiguous pollution exclusion here, with or without the *Madison* decision. Accordingly, certiorari in this case should be denied.

Respectfully submitted,

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